

9 Official Opinions of the Compliance Board 29 (2013)

- ◆ **Administrative Function**
 - ◇ *Within Exclusion, discussion of:*
Council's appointment to vacancy on the council
- ◆ **Closed Session Procedures**
 - ◇ *Written Statement, practices in violation*
Failure to prepare written statement
- ◆ **Minutes**
 - ◇ *Closed Session Statement, practices in violation*
Failure to prepare minutes or disclose summary of closed sessions
- ◆ **Open Session Requirement**
 - ◇ *Practices in violation*
Discussing in a closed session topics not within the claimed exception

*Topic headings correspond to those in the Opinions Index (2010 edition) at
<http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

August 9, 2013

Re: Town Council, Town of Hurlock
(*Reverend Charles T. Cephas, Complainant*)

We have considered the complaints of Reverend Charles T. Cephas ("Complainant"), a member of the Council of the Town of Hurlock ("Council"), that the Council violated the Open Meetings Act ("Act") from January 2009 to April 2013 by conducting closed sessions without making the disclosures required by the Act and by meeting in closed session to discuss topics that the Act requires to be discussed publicly. Complainant asks us to focus on closed sessions at which the Council discussed filling a Council vacancy, and on a third session in February 2013. He further alleges that the Council violated the Town Charter and that various officials knowingly violated the Act.

In a response submitted by its counsel, the Council acknowledges various violations of the Act. Counsel, who was appointed in late February 2013, states that "it does not appear that the Mayor and Council had been providing the reasons for closing the meeting and the topics to be discussed other than in a general way." Council also states that "it does not appear

that the minutes of the next open meeting following an executive session had been routinely including a statement of the time, place, and purpose of the closed meeting; a record of the vote to close the meeting, the authority to do so, a listing of the topics discussed, the person's present, and the actions taken." The Council has thus conceded that it violated the provisions of the Act set forth in State Government Article ("SG") §§ 10-508(d)(2)(ii) and 10-509(c)(2). Counsel met with the members of the Council on March 11 to explain the requirements of the Act. He states that the Council is now addressing open meetings compliance matters with the assistance of his firm.

We find that the Council violated the Act in the ways it has conceded. We additionally find that the Council violated the Act by considering in closed sessions matters that did not fall within the exceptions that it had cited as authority for excluding the public, and, further, that the Council failed to make the required disclosures about those sessions. To assist the Council in its future compliance with the Act, we will explain the statutory requirements applicable to closed sessions. Those requirements, and the violations we have found, are not mere technicalities.

Finally, we conclude, as we did in 8 *OMCB Opinions* 84 (2012), that the Council performs an administrative function, not subject to the Act, when it meets to fill a vacant Council seat.

We do not address the allegations that the Council violated the Town Charter with respect to the way in which its members voted to fill Council vacancies, as we only have the authority to address alleged violations of the Act. We also do not address Complainant's allegations that certain officials willfully violated the Act. Such allegations may be relevant in the context of an action filed in a circuit court, where testimony may be taken under oath and the parties may investigate facts, but the Compliance Board was not constituted as a fact-finding body, and they do not fall within our purview. With respect to Complainant's across-the-board allegations that the Council has violated the Act for over three years and his request that we review every meeting during that period, we will address the Council's practices over the last four months. Complainant has alleged the same categories of violations as to all of the meetings, and, as an advisory body, we are most concerned with the Council's current practices.

Discussion

A. The two meetings to fill a vacant Council seat

Complainant alleges that the Council violated the Act with respect to two meetings it held to fill a vacancy on the Council. In 2012, we addressed a similar complaint that this Council had violated the Act "by meeting behind closed doors to discuss the appointment of a person to a

vacancy on the Council” and by failing to disclose the events of the session. We concluded that the Council had performed one of its administrative functions at that meeting and that the meeting was therefore not subject to the Act’s notice and openness requirements. 8 *OMCB Opinions* 84 (2012), available at <http://www.oag.state.md.us/Opinions/Open2012/8omcb84.pdf>. We also found that the meeting was not subject to the Act’s disclosure requirements for administrative function meetings, because those requirements only apply when the public body has recessed an open meeting to perform an administrative function behind closed doors. SG § 10-503(c). Complainant’s allegations about the December 2009 meeting involve the same events we discussed there, and we reach the same result: the Council did not violate the Act, because the Act did not apply.

Complainant also alleges that the Council violated the Act in 2011 with respect to a meeting to fill a second vacancy. The Council voted on that vacancy in an open session. Whether a quorum of the Council also met behind closed doors to discuss the matter is unclear from the complaint, and the response questions whether any such event occurred. Even so, such a session would also have fallen within the administrative function exclusion. Complainant does not allege that the Council recessed an open session to discuss filling the vacancy, so the disclosure requirements in SG § 10-503(c) did not apply.

Because the Act did not apply to these meetings, the Council did not violate it. We have no role to play in the Complainant’s and Council’s discussions about whether the Council followed the proper procedures when it filled the vacancies.

B. The general allegations, as they pertain to the closed sessions in early 2013

We will state the rules and principles that apply when a public body decides to exclude the public from a meeting at which it will conduct business subject to the Act. They are derived from SG § § 10-506, 10-508, and 10-503, and citations to each can be found at 8 *OMCB Opinions* 182, 183 (2013). We will apply each rule to the 2013 meetings and state our conclusions in the process.

1. *Notice of the initial public meeting:* The public body must give notice of a public meeting and of the fact that it expects to conduct all or part of the business of the meeting in closed session, if it expects to do so.

As applied here: The January 7, January 28, February 11, and March 11 meetings were convened first as public meetings. We are unable to assess whether the Council expected to close part of these meetings.

2. Written “closing” statement to be made by presiding officer: The closing statement must disclose three items of information: the citation to the section of the Act that authorizes the exclusion of the public (the statutory “exception”); a description of the topic to be discussed; and a statement of the reason for excluding the public. The presiding officer should disclose as much information as he or she can without compromising the confidentiality of the session. Mere repetition of the words of the statutory exception is almost always insufficient. The disclosures should establish the applicability of the claimed exception.

As applied here: At three meetings, the Council met in closed session despite the fact that the presiding officer had not made a written statement. It violated the Act each time. The Council has already begun to comply; it prepared a written statement before closing its March 11 meeting.

3. Adequacy of written statement to serve its functions: When making the written statement, the presiding officer, and then the members who adopt it, should ensure that it will serve its several functions. First, a properly-completed written statement serves to prompt “each member of the public body, before voting, to consider whether the reason is sufficient to depart from the Act’s norm of openness.” 4 *OMCB Opinions* 46, 48 (2004). Second, it “helps members of the public who will be barred from the closed session to understand that this exception to the principle of openness is well-grounded.” *Id.* Third, it serves as an accountability tool, because it enables the public to compare the pre-meeting disclosures with the minutes summarizing the actual conduct of the meeting and thereby to assess whether the discussion stayed within the exceptions that the public body had claimed. *Id.* Finally, in the event that a complaint is filed, it tells us that the members of the public body considered the legality of closing the meeting and gives us their reason at the time for doing so. An after-the-fact justification for closing a meeting is not a substitute for that information.

As applied here: The written statement for the March 11 closed session mostly fulfills these functions because it details the topics on which legal advice was to be given, and we find that it substantially complies with the Act. We encourage the presiding officer to include more information on the “reasons for closing”; here, a member of the public might have wondered why those three topics were confidential.

4. Recorded vote to close to be conducted by presiding officer: The presiding officer is to conduct a recorded vote on a motion to close. The motion should reflect the contents of the written statement so that the

members understand what they are voting to discuss in closed session and why.

As applied here: The minutes of the open sessions show that the presiding officer conducted a recorded vote, but, until March 11, it is unclear whether the members knew the topics to be discussed and reasons for confidentiality. The complaint illustrates the need to announce the contents of the written statement before the members vote to close. As we understand the complaint, Complainant believed that he had voted on a motion to close the February 11 meeting to discuss personnel matters, only to learn in the closed session that one of the “personnel matters” was the Police Chief’s wish to address the contents of a letter that Complainant had written to the council and press on other matters before the Council.

5. Immediate availability and use of written statement: The statement is to be available immediately to a member of the public who requests it. Therefore, if the presiding officer takes the closing statement into the closed session to use as a reminder of the permissible scope of the discussion and as a place to record actions taken in the closed session (a practice we recommend), a copy should be left with staff outside of the meeting.

As applied here: We do not know when the March 11 statement was made available, but nothing suggests that the Council violated this requirement for that meeting. The Council had no written statements for the other meetings and therefore violated the requirement that the statement be immediately available.

6. Limitation of closed-session discussion to the topics listed and exceptions claimed on the written statement: The Act requires the public body to conduct its business openly except as the Act expressly permits. SG § 10-505. The Act expressly permits a public body to discuss 14 subjects in a closed session, so long as the public body has followed the procedures set forth above. SG § 10-508(a). That is, when a public body is performing a function subject to the Act, it may only exclude the public to discuss one or more of the 14 listed subjects, and, further, it may only convene the closed session after it has specified on a written statement the topic to be discussed, the applicable exception, and the reason for the secrecy and has conducted the required vote. The discussion in the closed session must fall within the scope of the exception claimed on the written statement, or else the discussion is illegal. *See* SG 10-508(a). The Act requires us to construe the exceptions strictly, in favor of openness. SG § 10-508(c).

As applied here: We find that the Council violated the Act on three occasions. On one occasion, the Council claimed an exception that does not exist; on the other two, the Council held closed-session discussions on topics that did not fall within the claimed exception.

The January 7 meeting was closed “to discuss financial matters relating to a new Police Station and matters regarding the hiring of a Town Attorney.” The Act does not contain an exception for “financial matters.” The sealed minutes reflect the discussion of prospective financial and facilities matters that were not subjects for a closed session. The Council did not discuss the hiring question.

The January 28 meeting, according to the sealed minutes, was closed “to discuss personnel and real estate matters.” During part of the meeting, the Council interviewed prospective municipal attorneys, a topic that fell within the exception provided by SG § 10-508(a) (1) for the discussion of the appointment or employment of appointees or employees over which it has jurisdiction. *See, e.g., 7 OMCB Opinions* 125, 128 (2011) (finding that discussions about public body’s attorney fell within the exception). The Council then discussed the rental of a town property to a third party. The Act contains an exception under which a public body may close a meeting to “consider the acquisition of real property for a public purpose and matters directly related thereto.” SG § 10-508(a) (3). That exception does not apply to discussions about real property the public body already owns. *See, e.g., 7 OMCB Opinions* 208, 211 (2011).

The February 11 meeting, closed to discuss personnel matters, included one presentation that fell within the exception because it mostly involved an individual employment matter. The other part of that discussion was tangential at best to the employment matter but was administrative in nature, as it involved the application of existing law to a set of facts. However, the discussion then apparently turned to the Police Chief’s responses to questions that Complainant had raised in a public letter about Town police facilities. The “personnel matter” exception, SG § 10-508(a) (1), applies to employment matters about individual employees, appointees, or officials within the public body’s jurisdiction. While we have interpreted it to extend to a public body’s discussions about the duties of its own members, *see 7 OMCB Opinions* 142 (2011), it does not provide a forum for discussions about facilities or policy matters. We conclude from the sealed minutes that the discussion extended to matters to which the claimed exception did not apply.¹

¹ The Act entitles us to review sealed minutes pertinent to a complaint, but we are to keep the contents confidential. SG § 10-502.5(c)(3)(iii). Our references to topics described in sealed minutes are therefore generic.

The discussion at the March 11 meeting fell within the exceptions claimed and topics listed, and we find that the Council complied with the Act at that session.

7. Closed-session minutes: The public body must keep minutes of the closed meeting. SG § 10-509(b). In most cases, the minutes will remain sealed until the public body votes to unseal them. SG § 10-509(c)(4)(iii).

As applied here: The Council kept minutes of the closed sessions. We encourage the Council to unseal the parts that report discussions that the Council should have held in open session.

8. Disclosures about sessions closed under an exception in SG § 10-508: The public body must disclose, in the minutes of either its next public meeting or the public meeting held that day, four items: (1) the time, place, and purpose of the closed session; (2) each member's vote on the motion to close the session; (3) the statutory exception or exceptions claimed as a basis for excluding the public; and (4) a list of the topics discussed, persons present, and actions taken in the closed session. SG § 10-509(c) (2); *see also 5 OMCB Opinions* 165, 170 (2007) ("Someone looking at the minutes should be able to see, within the confines of the minutes, the required information about the previous closed session."). A closed-session summary that merely repeats the words of the statutory exception only provides the third item.

As applied here: The documents submitted to us and posted on the Town's website do not contain such summaries. As conceded in the Council's response, it appears that the Council has consistently violated this requirement.

9. Disclosures about sessions closed to perform an administrative function: If the public body recessed the public meeting to perform an administrative function in a closed meeting, it must disclose the following information in the minutes of either its next public meeting or the public meeting held that day: (1) the date, time, place, and persons present at the closed session and (2) a phrase or sentence identifying the subject matter discussed there. SG § 10-503(c).

As applied here: The "work sessions" for which we have minutes provided to us appear to have been stand-alone sessions to which the requirement does not apply, and, in any event, may have been open to the public.

In sum, the Council violated the Act in numerous ways during the first quarter of 2013. Most violations stemmed from the Council's failure

to identify, in writing and with precision, the topics it wished to discuss in closed session, the statutory basis for conducting that particular public business behind closed doors, and the reason for excluding the public. When the Council must meet in closed session, we encourage the presiding officer to use the closing statement as an agenda for the discussion and to ensure that the discussion stays within the exceptions and topics that have been disclosed. The attendance of counsel is often helpful in this regard.

Conclusion

The Act sets the presumption that the public is entitled to observe the conduct of public business by the public entities subject to the Act, and it sets strict conditions on the conduct of closed sessions. The Council violated the Act by not meeting the provisions of the Act that restrict the topics that may be discussed in a closed session and by not making the disclosures required of it both before and after a closed session. We encourage the Council in its current efforts to comply with the Act.

Open Meetings Compliance Board

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*Jeffrey C. Middleton, a law clerk in the Office of the Attorney General, contributed significantly to the preparation of this opinion.